No. 745

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH DiVARCO and JOSEPH ARNOLD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAYMOND J. SMITH
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioners

WILLIAM J. HADDAD
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Petitioners, Joseph DiVarco and Joseph Arnold submit this brief to supplement their prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

ORIGINAL PETITION FOR WRIT OF CERTIORARI

The original petition for writ of certiorari was received by the Clerk of the United States Supreme Court on November 8, 1973.

GROUNDS FOR SUPPLEMENTAL BRIEF

Under Supreme Court Rule 24(5)

> "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matters not available at the time of his last filing."

On May 20, 1973 the Honorable Joseph T. Sneed then the Deputy Attorney General of the United States and presently sitting on the United States Court of Appeals for the Ninth Circuit, enunciated his remarks before the Tax Section of the American Bar Association in Washington, D.C. His remarks were reported in *The Tax Lawyer* (Fall, 1973), Volume 27, No. 1, Pp. 15-22. Such remarks were not available to the Petitioners' counsel until November 19, 1973, subsequent to the submission of the petition for writ of certiorari before this Honorable Court. (See Appendix A of Supplemental Brief for excerpt of Judge Sneed's remarks.)

SUPPLEMENTAL REASON FOR GRANTING CERTIORARI

(II.)

THE DEFENDANTS' ALLEGED MISREPRESENTATIONS DID NOT CONSTITUTE AN OFFENSE UNDER TITLE 26, U.S.C., SECTION 7206(1).

The Petitioners' position throughout this case has been that a prosecution under Title 26, U.S.C., Section 72.06(1) does not lie where the accused has not demonstrated an intent to evade paying taxes; that an intentional misstatement as to the source of income, standing alone, is conduct insufficient to merit prosecution under Section 7206; and that the proper charge against such conduct arises under Title 18, Section 1001.

The Honorable Joseph T. Sneed concurred with the above proposition when he commented to the American Bar Association regarding S. 1400, 93 Congress, First Session (1973), and the recommendations of the National Commission on Reform of the Federal Criminal Laws:

> "A substantial tax deficiency is required for the Section 7201 violation but not for the lesser crime, the Section 7206 violation."
>
> "The Commission combined these two felonies to provide that a person is guilty of tax evasion if 'with intent to evade any tax, he filed or causes the filing of a tax return which is false as to a material matter' (Section 1401). Thus 'an intent to evade tax' is required in all cases of filing false returns . . ."
>
> "The requirement of an 'intent to evade' tax or tax payment in all felony cases we believe is desirable. It is a very rare case where the government fails to prove

an intent to evade; where this is not possible, other courses of action are available, such as prosecution under the general false statement provisions."

Tax Lawyer, Volume 27, No. 1, P. 18 (Fall, 1973)

After commenting on *Spies* v. *The United States*, 317 U.S. 492 (1942), Judge Sneed, speaking in his capacity as then Deputy Attorney General of the United States, stated the position of the Department of Justice:

"Thus, the Department has concluded that proof of a deficiency should remain a requirement in a tax evasion prosecution. The reasons for this are threefold. First, the tax evasion provision is the capstone of a system of sanctions designed to protect the revenue. The deficiency requirement serves as a means of identifying the 'corpus delicti' of the crime and focuses attention on fundamental point . . . the loss of revenue to the government. This comports with commonly excepted notions of tax evasion and it is difficult to make an impassioned plea that a seven year felony should attach even if no loss to the government is shown. Second, in the relatively few fragrant cases where the intent to evade is clear but a deficiency is lacking, the government can still proceed under the general attempt statute (Section 1001) if the requisite conduct toward commission of the offense can be demonstrated. Third, tax returns are also included under the proposed False Statement Statute (Section 1343), which makes it a three year felony to knowingly or with reckless disregard make a false statement of a material matter. Since conviction under this section requires neither a deficiency nor an intent to evade tax, it is not difficult to see that the major tax evasion provision should contain both requirements in order to justify the more serious felony."

Tax Lawyer, supra., P. 20.

It has been the Petitioners' position throughout the prosecution of this case that the intent, purpose and scope of Title 26, Section 7206(1) is limited to cases where the accused made a false understatement of income or a false overstatement of deductions or other such misstatements with the intent to evade taxation. The embodied remarks of Judge Sneed supplemented herein confirm this premise.

CONCLUSION

For the foregoing reasons the Petitioners respectfully resubmit that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RAYMOND G. SMITH
Attorney for Petitioners

WILLIAM J. HADDAD
Of Counsel